**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| **STATE OF WASHINGTON,** | ) | **No. 24125-4-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| **JEREMIAH IGNACIO MARTINEZ,** | ) | |
| | ) | **UNPUBLISHED OPINION** |
| **Appellant.** | ) | |

**SCHULTHEIS, J. —** Jeremiah Ignacio Martinez was a passenger in a car that crashed into a power pole during a high-speed chase with law enforcement officers after the driver failed to stop for a traffic infraction. Officers searched Mr. Martinez and found a baggie of methamphetamine in his pocket. Mr. Martinez appeals the denial of his suppression motion. He claims the court erred in concluding the search was justified by the officer safety exception to the warrant requirement. We agree and reverse the trial court's denial of his suppression motion, vacate his conviction, and dismiss the charges with prejudice.

## FACTS

The facts as set forth in the suppression order's findings of fact and conclusions of law are not disputed. On March 11, 2005, a vehicle in which Mr. Martinez was a front seat passenger sped past a Benton County sheriff's deputy. At the time, the car was going 56 mph in a 25 mph zone in the 3100 block of West 7th Avenue in Kennewick, Washington. The officer activated his lights and followed. When the driver did not stop at a stop sign, but turned and accelerated, the officer turned on his siren. The driver led the officer on a four-and-a-half-minute chase through traffic at speeds up to approximately 70 mph while running stop signals and passing other vehicles on the right and across double yellow lines. Upon reaching a busy intersection, the driver of the fleeing vehicle slammed on his brakes at the red light, causing his car to skid through the intersection (somehow missing the crossing traffic) and hit a power pole. By then three patrol cars had converged at the scene. Both Mr. Martinez and the driver were removed from the car at gunpoint, arrested, "proned out," searched, handcuffed, and taken to a patrol car. Report of Proceedings (RP) at 12. When officers searched Mr. Martinez, they found a baggie in his front pants pocket that contained methamphetamine.

Mr. Martinez was charged with methamphetamine possession. He moved to suppress the drug evidence because his arrest was unlawful. The trial court ruled that although the officers did not necessarily have probable cause to arrest Mr. Martinez, the search was justified by officer safety.[1] Mr. Martinez was convicted on stipulated facts.

**DISCUSSION**

Our review of the trial court's conclusions of law from the order denying the suppression of evidence is de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Unless the State shows that a particular warrantless search or seizure falls under one of the few "jealously and carefully drawn" exceptions to the warrant requirement, it is per se unreasonable as a violation of the Fourth Amendment and article I, section 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Here, the trial court ruled that the *Terry* investigative stop exception applies. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under *Terry*, a law enforcement officer may conduct a limited search for weapons to protect the officer or persons nearby from physical harm. *Id.* at 30; *State v. Alcantara*, 79 Wn. App. 362, 366, 901 P.2d 1087 (1995).

Washington courts hold that *Terry* permits law enforcement to "'briefly stop an individual based upon reasonable suspicion of criminal activity if necessary to maintain the status quo while obtaining more information.'" *Duncan*, 146 Wn.2d at 172 (quoting *State v. Miller*, 91 Wn. App. 181, 184, 955 P.2d 810, 961 P.2d 973 (1998)). For the

[1] Although Mr. Martinez argued at the suppression hearing that the scope of any officer safety search was exceeded, he does not argue that point on appeal. We therefore do not reach that issue.

*Terry* stop to be valid the State must show: (1) the initial stop was legitimate; (2) a reasonable safety concern existed to justify a protective frisk for weapons; and (3) the scope of the frisk was limited to the protective purposes. *Id.*

"A protective frisk is justified only when the officer can point to 'specific and articulable facts' that create an objective, reasonable belief that the suspect is armed and dangerous." *State v. Lennon*, 94 Wn. App. 573, 580, 976 P.2d 121 (1999) (citing *Terry*, 392 U.S. at 21-22; *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)). Though courts are generally reluctant to second-guess the judgment of officers in the field, those frisks that arise from "founded suspicion" that are neither arbitrary nor harassing are more likely to be upheld. *Id.* (citing *Collins*, 121 Wn.2d at 173). Suspicion must be specific to the particular suspect; "generalized suspicion" is insufficient. *Id.* (citing *State v. Galbert*, 70 Wn. App. 721, 725, 855 P.2d 310 (1993)). Mere proximity to others suspected of criminal activity does not deprive a person of their Fourth Amendment protections. *Id.*

The only evidence before the trial court in Mr. Martinez's case derived from the testimony of one officer involved in the chase. That officer testified that he was not the one who initially attempted to stop the vehicle, and when he entered the car chase, he only knew that the driver did not stop when he was signaled to do so for speeding and the chase reached high speeds. He testified:

> This is a high-risk stop. It's a felony-type situation. At the time that I'd entered into it I didn't know what I had. I knew that there was criminal

> activity afoot. I suspected that there's a possibility, you know, that the passenger may possibly have the driver at gunpoint and is forcing him to drive at these speeds. I didn't know if I had an armed robbery. I didn't know if I had a car jacking.
>
> I mean, a lot of things were going through my mind because this isn't an ordinary traffic stop from an ordinary citizen who pulls right over and yields to an emergency vehicle almost immediately unless they don't see you right away. They may continue a little ways, but they certainly don't drive at these great speeds and put everybody at risk at the levels of speeds that we were traveling at.

RP at 11.

*Terry* requires us to review the factual circumstances on a case-by-case basis to determine the reasonableness of the law enforcement action and the extent of the intrusion, in light of the circumstances facing the officer. *State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243 (1975). At the same time, it is instructive to compare the facts in this case to those in other cases.

We contrast the facts in this case with those in *State v. Malbeck*, 15 Wn. App. 871, 873-874, 552 P.2d 1092 (1976). There, Division Two of this court affirmed the trial court's ruling that the search of the passenger side seat area was reasonable for officer safety. A state trooper arrested a driver for reckless driving on the basis of speed after a 10-mile high-speed chase. As the car pulled over, the passenger bent over as if to hide something under the seat. When asked for his identification, the passenger produced an expired and apparently altered driver's license. The court held that under those

circumstances, the officer's suspicions were reasonable that a concealed weapon could be under the seat and used by the passenger that remained in the vehicle. We agree with the general premise underlying *Malbeck*—that a high-speed car chase alone is an insufficient basis to search all occupants of a vehicle.

In *State v. Wilkinson*, 56 Wn. App. 812, 785 P.2d 1139 (1990), Division One of this court upheld the search of a passenger by a lone officer who recognized two passengers as felons he had personally arrested. The officer testified that he felt threatened. Here, at least three patrol cars arrived at the scene and the officers had their guns drawn. There is no indication from the record that any officer had any prior knowledge of either the driver or the passenger. Although the fact that Mr. Martinez was held at gunpoint is a manifestation of fear, the safety concern must be reasonable. S*tate v. Terrazas*, 71 Wn. App. 873, 878, 863 P.2d 75 (1993). The fact that the driver was speeding and driving recklessly did not provide grounds for the officer to feel threatened by Mr. Martinez. The suspicion must be individualized. *State v. Jones*, 146 Wn.2d 328, 336, 45 P.3d 1062 (2002). Moreover, the officer did not articulate a reasonable basis in fact for the violent and weapon-related criminal conduct that he imagined that Mr. Martinez may have engaged in. Notably, the officer associated Mr. Martinez to this conduct never having laid eyes on him. Thus, his suspicion could not be anything but generalized.

Both parties rely on *Terrazas* for support. In *Terrazas*, this court held that an officer did not have a reasonable basis to suspect that a backseat passenger in a stopped car was armed and dangerous, when the suspicion was supported solely by his observation that the passenger's hands were concealed under a blanket on a cold winter night. The search of the passenger was not justified because the officer "was aware of only a potential hazard; he did not have any articulable suspicions that [the passenger] personally was dangerous or may have had access to a weapon." *Terrazas*, 71 Wn. App. at 879. Moreover, the passengers and driver were cooperative, did not make nervous or furtive gestures or say anything to lead the officer to suspect they were armed or dangerous. Thus, the officer's suspicion that the passenger may have been concealing a weapon was not reasonable.

Mr. Martinez properly points out that like the defendant in *Terrazas*, he made no furtive gestures. *Id.* Mr. Martinez also correctly emphasizes that there is nothing to show that law enforcement had a reasonable suspicion that he was armed and dangerous. The State contends that *Terrazas* is distinguishable because the driver's offense there was minor. We agree that this is a case-by-case inquiry that requires an examination of the totality of the circumstances presented to the officer, including the crime being investigated, to determine whether the officer's suspicion was reasonable. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); *Terrazas*, 71 Wn. App. at 879. But

the individual to be searched must be the focus of the totality of the circumstances. *Terrazas*, 71 Wn. App. at 879. The State focuses on crimes committed by the *driver*. But the suspicion must be individualized. Merely associating with a person suspected of criminal activity "does not strip away the protections of the [F]ourth [A]mendment." *State v. Broadnax*, 98 Wn.2d 289, 296, 654 P.2d 96 (1982). Even a brief seizure is not justified by mere proximity to criminal activity. *State v. Crane*, 105 Wn. App. 301, 312, 19 P.3d 1100 (2001). There must be something more to indicate that the particular person seized may be a threat to safety.

The State focuses on the officer's testimony concerning the danger of the car chase. We agree that the chase was undoubtedly dangerous. We also acknowledge that flight is recognized as circumstantial evidence of guilt, and it is therefore relevant for probable cause. *State v. Graham*, 130 Wn.2d 711, 726, 927 P.2d 227 (1996). Mr. Martinez, however, was not driving the vehicle. There is nothing to associate him with the danger or the flight. Moreover, the danger of the chase is not particularly pertinent to the danger to the officers that existed afterward. *See, e.g., State v. White*, 83 Wn. App. 770, 774-75, 924 P.2d 55 (1996) (observing that once the danger justifying the search is no longer present, the rationale for the search dissipates and police are required to obtain a warrant to search further), *rev'd on other grounds*, 135 Wn.2d 761, 958 P.2d 982 (1998).

The officer testified that Mr. Martinez did not attempt to gain the attention of the officers during the car chase by waving or otherwise indicating to them that he wanted out of the car. Instead, the officer testified that from the officer's vantage point behind the vehicle, "He was face forward, and for all appearances that I had in the distance that I pursued it was like he was goin' along with it." RP at 14. But the officer also testified that when Mr. Martinez exited the car, he told the officer, "it wasn't his idea to speed." RP at 14. In *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986), the court upheld a protective search for weapons of the area under the seat of a car after an officer had removed the driver but left a passenger of a car he stopped when he saw the driver lean over and reach under the seat as though to place something under it. The court reasoned that the furtive gesture gave the officer justification to believe there might be a weapon under the seat to which the passenger had easy access. *Id.* at 11-12. Here, the State asserts that the absence of gestures justified the search. To the extent that the State argues a departure from *Kennedy*, we reject it.

**CONCLUSION**

The officers lacked reasonable suspicion that Mr. Martinez may have been concealing a weapon. We therefore reverse the trial court's denial of his suppression

motion. Because the State's case rested exclusively on the improperly seized evidence, we vacate his conviction and dismiss the charges with prejudice.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, J.

WE CONCUR:

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Sweeney, C.J.

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Thompson, J. Pro Tem.